

116. The yarn of claim 114 having a Plug Crush Recovery of at least about 90%.

117. Carpet tufted with yarn according to claim 114.

118. The yarn of claim 114 wherein the filaments consist essentially of said blend having incorporated therein at least one additive that is a pigment, process aid, flame retardant, heat stabilizer, light stabilizer, antimicrobial agent, electrically conductive material, antistatic agent or stain resisting agent.

119. The yarn of claim 118 having a Plug Crush Recovery of at least about 87%.

120. The yarn of claim 118 having a Plug Crush Recovery of at least about 90%.

121. Carpet tufted with yarn according to claim 118. --

#### REMARKS

The subject application is a Continued Prosecution Application of Application No. 08/928,156, filed September 12, 1997, which was finally rejected in an Office Action mailed August 11, 2000.

All claims of the prior application have been canceled in favor of new claims 92-121 presented herein. The new claims more clearly define the claimed subject matter and overcome the final rejections in the prior application, as discussed below.

The new claims presented herein do not constitute new matter. Independent claims 92 and 105 are directed to yarns consisting essentially of substantially continuous filaments and characterized with reference to recited forms of bulk, recited denier, shrinkage and Plug Crush Recovery properties, and filament composition. Basis for the new independent claims is clearly seen in claim 1 of the prior application as filed and at page 37 lines 1-4 with respect to the substantially continuous filaments and recited Plug Crush Recoveries, in the description of the invented yarns, including preferred forms of bulk and yarn deniers, at page 37 line 22 to page 38 line 27, and in the definition of propylene polymers and compositions of which the filaments are composed in the paragraph bridging pages 28-29. Bulk in the form of "random entanglement,

waviness, looping and whirling of filaments and fluffiness of yarns imparted by texturing with fluid jets ..." is specifically disclosed at page 37 lines 22-24, and lines 27-30 of the same page describes bulk imparted by texturizing with fluid jets as a preferred form of bulkiness both for its contribution to resilience and the desirable appearance and coverage it imparts. Shrinkage values recited in the new independent claims are described as preferred for textured yarns at page 36 lines 18-19. Dependent claims 93-104 and 106-121 are directed to more specific aspects of Plug Crush Recovery and filament composition, and to carpets tufted with the claimed yarns. Support for the recited Plug Crush Recoveries appears at page 39 lines 17-20, that for the filament compositions is at pages 28-29 as noted above and that for the tufted carpets is in original claims 6-8 of the prior application.

The prior application was finally rejected for same invention double patenting based on claims 11, 14-17, 24 and 25 of Applicants' US 5,945,215, for insufficient support for some of the claims and for anticipation and/or obviousness in view of Wishman published European Patent Application 89103218.7. As discussed below, none of those rejections is applicable to the new claims presented herein.

Referring first to the double patenting rejection in the prior application, the new claims presented herein include limitations not recited in the claims of the patent. Likewise, the patent claims include limitations not recited in the new claims. One example is the Apparent Average Microfibril Diameter recitation in claim 1 of the patent, which is incorporated into each of its dependent claims 11, 14-17, 24 and 25, but which is not found in any of the claims presented herein. Others include the shrinkage, denier and bulk recitations in the new claims, none of which is recited in any of claims 11, 14-17, 24, 25 or any other claim of the patent.

MPEP 804 (page 800-15, July 1998) articulates the following "reliable test" for same invention double patenting:

"A reliable test for double patenting under 35 U.S.C. 101 is whether a claim in the application could be literally infringed without literally

infringing a corresponding claim in the patent. [citations omitted] . . . Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment, then identical subject matter is not defined by both claims and statutory double patenting does not exist."

Applying this test, it is clear that there is not statutory double patenting in the instant situation. Yarn within the literal scope of the claims of the application, but having Apparent Average Microfibril Diameter different from that recited in claims of the patent, would not literally infringe the patent. Yarn within the literal scope of the patent, but lacking bulk, shrinkage or denier recited in the claims of the application, would not literally infringe the application.

In the final rejection and prior actions, the Examiner dismissed differences between claims of the patent and claims of the application based on incorrect and unsubstantiated assertions that limitations are "inherent." That is improper. Even if the assertions of inherency were accurate and substantiated (they are not), the test articulated in the MPEP calls for analysis based on literal infringement. Nonexistent limitations and unrecited claim language are not properly part of that analysis. Therefore, the MPEP's test for statutory double patenting leads clearly to the conclusion that there is no double patenting between the claims presented herein and those of US 5,945,215.

Some of the claims in the prior application were finally rejected as unpatentable under 35 USC 112 for lack of proper basis in the disclosure. None of the claims presented herein corresponds to those rejected claims or includes the features that were the basis of the rejection. Therefore, that rejection of the prior application is not applicable to the new claims.

Finally, all claims of the prior application were finally rejected as unpatentable over the Wishman published application under 35 USC 102 and/or 103. That rejection also is not applicable to the claims presented herein.

Wishman is directed to fibers and yarns said to have improved compressional recovery. This reference was known to Applicants when the prior application was filed, as seen at page 11 line 14 to page 12 line 18 of the

specification. As stated there, and in Wishman itself, crimping in a particular manner and then heating to permanently set the crimp are essential to Wishman's stated improvement in compressional recovery. Thus, Column 3 lines 41-58 of the publication state as follows:

"The fibers are then crimped. The type of crimp imparted to the fibers can be described as either a sharp edge angular or non-helical crimp. These are the so-called two-dimensional or sawtooth crimps. The preferred method of imparting such a crimp is a stuffer box assembly.

"The fiber has an average crimp count in the range of about 4 crimps per inch to about 20 crimps per inch, with an average crimp count in the range of about 6 crimps per inch to about 15 crimps per inch being preferred, 6 to 10 being most preferred.

"After a crimp is imposed in the fibers, they are taken from the texturing region and are heated in suitable means at a temperature sufficient and for a time sufficient to allow the crimp imparted in the fiber to be permanently set so that the fibers will have an improved compression recovery."

Thus, Wishman emphasizes not only a particular form of crimp, but permanently setting that crimp, to achieve compressional recovery. No other form of bulk, texture, or even other crimp, is disclosed or in any way suggested in Wishman. Furthermore, by permanently setting the particular crimp, Wishman's teaching, on its face, precludes introduction of other forms of texture or bulk.

All of the claims presented herein are unobvious from Wishman because the claims recite that the claimed yarns have bulk in the form of at least one of random entanglement, waviness, looping and whirling of filaments. None of those is, or is fairly suggested by, Wishman's disclosure of sharp edge angular, non-helical, sawtooth or two-dimensional crimp.

The claims presented herein further distinguish over Wishman because the reference does not disclose or suggest improved compressional recovery as indicated by Applicants' Plug Crush Recovery test. As seen from the description of Wishman's compressional recovery testing in the paragraph bridging Columns

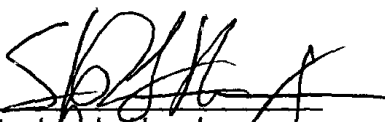
4-5, Wishman's test results utilize sample heights immediately after compression and after 24 hours recovery from compression. No comparison to sample height before compression is provided, nor is there any disclosure or data in the reference purporting to demonstrate or assess any correlation of those results to compressional recovery results in carpet testing. In contrast, the Plug Crush Recovery test, described at page 61-67 of Applicants' specification, measures height of a sample after recovery from compression relative to initial sample height before compression, and correlation of Plug Crush Recovery test results to results of actual carpet testing is discussed at page 23 line 12 to the end of page 27 of Applicants' specification and seen from Tables I and II appearing therein and from Fig. 4.

A still further distinction over Wishman is the shrinkage recited in the newly presented claims. There is nothing in Wishman's disclosure that describes or suggests those shrinkages.

In view of the above, Wishman does not anticipate or make obvious any of the claims presented herein.

For the foregoing reasons, the final rejections of the claims of the prior application are not applicable to the claims presented herein. Therefore, it is submitted that all of the new claims are in condition for allowance and such action is respectfully requested.

Respectfully submitted,

  
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